

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRENDA MARCH, EDGAR MARCH,

CASE NO. C20-5032 BHS

Plaintiffs,

ORDER GRANTING
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY
JUDGMENT

ETHICON, INC.,

Defendant.

This matter comes before the Court on Defendant Ethicon, Inc.'s renoted motion for partial summary judgment. Dkt. 42. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion for the reasons stated herein.

I. FACTUAL & PROCEDURAL BACKGROUND

On September 12, 2013, Plaintiffs Brenda and Edgar March filed suit against Ethicon in the MDL *In re Ethicon, Inc. Products Liability Litigation*, MDL No. 2327, located in the Southern District of West Virginia. Dkt. 1. On October 16, 2018, Ethicon filed a motion for partial summary judgment. Dkts. 42, 43. On October 25, 2018, Plaintiffs responded. Dkt. 45. On October 31, 2018, Ethicon replied. Dkt. 46. The

1 Southern District of West Virginia did not resolve the motion prior to transfer. *See* Dkt.
2 78 at 3 n.1. On August 6, 2020, Ethicon filed a supplemental motion for summary
3 judgment. Dkt. 76. On October 19, 2020, the Court granted the motion in part and denied
4 it in part. Dkt. 81.

5 Ethicon moved to renote the MDL motion for summary judgment on November
6 11, 2020. Dkt. 81. The Court granted the motion, Dkt. 86, and the parties filed a joint
7 status report regarding the remaining claims at issue in Ethicon's renoted motion, Dkt.
8 87. The remaining claims are: Negligence (Count I), Strict Liability – Manufacturing
9 Defect (Count II), Strict Liability – Defective Product (Count IV), Negligent
10 Misrepresentation (Count IX), Negligent Infliction of Emotional Distress (Count X), and
11 Violations of Consumer Protection Laws (Count XIII).¹

12 II. DISCUSSION

13 Ethicon argues it is entitled to summary judgment for the remaining claims
14 because the claims fail as a matter of law.

15 A. Summary Judgment Standard

16 Summary judgment is proper only if the pleadings, the discovery and disclosure
17 materials on file, and any affidavits show that there is no genuine issue as to any material
18 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).
19 The moving party is entitled to judgment as a matter of law when the nonmoving party
20 fails to make a sufficient showing on an essential element of a claim in the case on which

21 ¹ Plaintiffs have conceded to the dismissal of Count II and Count XIII. *See* Dkt. 45.
22 Therefore, summary judgment is granted, and the claims are dismissed with prejudice.

1 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
 2 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
 3 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
 4 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must
 5 present specific, significant probative evidence, not simply “some metaphysical doubt”).
 6 Conversely, a genuine dispute over a material fact exists if there is sufficient evidence
 7 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing
 8 versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W.*
 9 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

10 The determination of the existence of a material fact is often a close question. The
 11 Court must consider the substantive evidentiary burden that the nonmoving party must
 12 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
 13 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
 14 issues of controversy in favor of the nonmoving party only when the facts specifically
 15 attested by that party contradict facts specifically attested by the moving party. The
 16 nonmoving party may not merely state that it will discredit the moving party’s evidence
 17 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
 18 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
 19 nonspecific statements in affidavits are not sufficient, and missing facts will not be
 20 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

1 **B. Strict Liability – Defective Product**

2 Ethicon argues that it is entitled to summary judgment as a matter of law on
 3 Plaintiffs' Strict Liability – Defective Product claim because the Washington Products
 4 Liability Act ("WPLA"), RCW 7.72 *et seq.*, does not recognize such a cause of action.
 5 Dkt. 43 at 6. Plaintiffs respond, arguing that Ethicon can be held strictly liable if it failed
 6 to properly warn the patient. Dkt. 45 at 5.

7 The WPLA permits claims against a product manufacturer "if the claimant's harm
 8 was proximately caused by the negligence of the manufacturer in that the product was not
 9 reasonably safe as designed or not reasonably safe because adequate warnings or
 10 instructions were not provided." RCW 7.72.030(1). These claims are commonly known
 11 as design defect claims and failure to warn claims, respectively. *See Kirkland v. Emhart*
 12 *Glass S.A.*, 805 F. Supp. 2d 1072, 1076 (W.D. Wash. 2011). The WPLA also permits
 13 claims "if the claimant's harm was proximately caused by the fact that the product was
 14 not reasonably safe in construction or not reasonably safe because it did not conform to
 15 the manufacturer's express warranty or to the implied warranties under Title 62A RCW."
 16 RCW 7.72.030(2).

17 Plaintiffs' short form complaint asserts strict liability claims for manufacturing
 18 defect, failure to warn, defective product, and design defect.² It appears to the Court that
 19 Ethicon is correct that neither the WPLA nor Washington law recognize a cause of action
 20 for defective product. *Cf. Liriano v. Hobart Corp.*, 700 N.E.2d 303, 305, 92 N.Y.2d 303,

21

 22 ² Plaintiffs have conceded their manufacturing defect claim, *see* Dkt. 45, but their failure
 to warn and design defect claims remain viable, *see* Dkt. 81.

1 237 (1998) (acknowledging New York's cause of action for defective product; "[a]
 2 product may be defective when it contains a manufacturing flaw, is defectively designed
 3 or is not accompanied by adequate warnings for the use of the product." (citations
 4 omitted)). And Plaintiffs have not provided any law establishing that Washington
 5 recognizes an action under the WPLA for defective product. Plaintiffs' argument that
 6 Ethicon may be held strictly liable if it failed to properly warn Mrs. March through her
 7 implanting physician is a failure to warn claim, not a defective product claim.

8 Therefore, summary judgment is granted, and Plaintiffs' Strict Liability –
 9 Defective Product claim is dismissed with prejudice.

10 **C. Negligence-Based Claims**

11 Ethicon additionally argues that Plaintiffs' negligence-based claims—Negligence
 12 (Count I), Negligent Misrepresentation (Count IX), and Negligent Infliction of Emotional
 13 Distress (Count X)—are preempted by the WPLA. Dkt. 43 at 7–8. Plaintiffs assert that
 14 their claims are not preempted because their claims "are not exclusively product based"
 15 and "sound[] in intentional conduct which is excluded from the WPLA's preemptive
 16 scope." Dkt. 45 at 6.

17 The WPLA "creates a single cause of action for product-related harms that
 18 supplants previously existing common law remedies." *Wash. Water Power Co. v.*
 19 *Graybar Elec. Co.*, 112 Wn.2d 847, 860. The WPLA's statutory cause of action preempts
 20 all product-related common-law claims based on any substantive legal theory except
 21 fraud, intentionally caused harm, or claims under Washington's Consumer Protection
 22 Act. RCW 7.72.010(4). Plaintiffs argue that they could recover under their negligence-

1 based claims if Ethicon’s failure to warn was an intentional act. The Court has considered
 2 and rejected similar arguments about whether the WPLA preempts negligence claims
 3 when a plaintiff argues the underlying conduct sounded in intentional wrongdoing. *See*
 4 *City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096, 1102–03 (W.D. Wash. 2017). The
 5 WPLA clearly contemplates negligence and negligent misrepresentation within its scope
 6 of preemption. RCW 7.72.010(4) (a product liability claim includes, *inter alia*, any claim
 7 based on negligence or misrepresentation, whether negligent or innocent).

8 Plaintiffs additionally rely upon *Bylsma v. Burger King Corp.*, 176 Wn.2d 555,
 9 562 (2013), to argue that relief may be granted under the WPLA for negligent infliction
 10 of emotional distress. However, the Washington Supreme Court limited its holding in
 11 *Bylsma* to only allow “relief for emotional distress damages, *in the absence of physical*
 12 *injury*, caused to the direct purchaser by being served and touching, but not consuming, a
 13 contaminated food product, if the emotional distress is a reasonable response and
 14 manifested by objective symptomatology.” *Id.* at 561–562 (emphasis added). Mrs. March
 15 has experienced physical symptoms and bodily injuries that she attributes to her TVT-O
 16 implant. *See, e.g.*, Dkt. 77-2 at 8 (“The bodily injuries include a constant pain and
 17 inability to use my body the way I could prior to the implant.”). Plaintiffs’ claims for
 18 negligent infliction for emotional distress thus fall outside the scope contemplated by
 19 *Bylsma* and within the WPLA’s scope of preemption.

20 Therefore, summary judgment is granted, and Plaintiffs’ negligence-based claims
 21 are dismissed with prejudice.

III. ORDER

Therefore, it is hereby **ORDERED** that Ethicon's motion for partial summary judgment, Dkt. 42, is **GRANTED**.

Plaintiffs' claims for Negligence (Count I), Strict Liability – Manufacturing Defect (Count II), Strict Liability – Defective Product (Count IV), Negligent Misrepresentation (Count IX), Negligent Infliction of Emotional Distress (Count X), and Violations of Consumer Protection Laws (Count XIII) are **DISMISSED with prejudice.**

Dated this 24th day of February, 2021.


BENJAMIN H. SETTLE
United States District Judge